

AMENDMENTS TO RULE 16

RULE 16 is amended as follows:

RULE 16. Postassignment Conferences--Scheduling--Management

(a) Postassignment Conferences--Objectives. In any action, the ~~[judge to whom the action is assigned]~~ **court** may in ~~[the]~~ **its** discretion ~~[of that judge,]~~ direct the attorneys for the parties and any unrepresented parties to appear for a conference or conferences for such purpose as

- (1) expediting the disposition of the action;
- (2) establishing early and continuing control so that the action will not be protracted because of lack of management;
- (3) discouraging wasteful activities;
- (4) improving the quality of the proceedings for the final disposition of the action through more thorough preparation; and
- (5) facilitating the settlement of the action.

(b) Scheduling and Planning. Except as provided in Rule 56.2 or when the judge to whom the action is assigned finds that a scheduling order will not aid in the disposition of the action and enters an order to that effect, together with a statement of reasons and facts upon which the order is based, the judge shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or suitable means, enter a scheduling order that limits the time

- (1) to join other parties and to amend the pleadings;
- (2) to file and hear motions; and
- (3) to complete discovery.

The scheduling order also may include

(4) modifications of the times for disclosures under Rule 26(a) and 26(c)(1) and of the extent of discovery to be permitted;

~~[+4+]~~ **(5)** the date or dates for conferences before submission of the action for final disposition, a final postassignment conference, and trial or submission of a dispositive motion; and

~~[+5+]~~ **(6)** any other matters appropriate in the circumstances of the action.

The scheduling order, or the order that a scheduling order will not aid in the disposition of the action, shall issue as soon as practicable but in no event more than 90 days after the action is assigned. A schedule shall not be modified except by leave of the judge upon a showing of good cause.

(c) Subjects to be Discussed at Postassignment Conferences. The

participants at any conference under this rule may consider and take action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence[+], **and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence;**

(5) the appropriateness and timing of summary adjudication under Rule 56;

(6) the control and scheduling of discovery, including orders affecting disclosure and discovery pursuant to Rule 26 and Rules 29 through 37;

[+5+] **(7)** the identification of witnesses and documents, the need and schedule for filing and exchanging briefs, and the date and dates for further conferences and for submission of the action for final disposition;

[+6+] **(8)** the advisability of referring matters to a master;

[+7+] **(9)** the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

[+8+] **(10)** the form and substance of scheduling or postassignment conference order;

[+9+] **(11)** the disposition of pending motions;

[+10+] **(12)** the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(13) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;

(14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(15) an order establishing a reasonable limit on the time allowed for presenting evidence;

[+11+] **(16)** access to confidential or privileged information, **including business proprietary information**, contained in an administrative record, which is the subject of the action; and

[+12+] **(17)** such other matters as may aid in the disposition of the action.

At least one of the attorneys participating in any postassignment conference shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. **If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.**

(d) Final Postassignment Conference. * * *

(e) Orders. * * *

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or postassignment conference order, or if no appearance is made on behalf of a party at a scheduling or postassignment conference, or if a party or a party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)[~~, (3) and (4)~~](**(B), (C), (D)**). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing or both to pay the reasonable expense incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that order circumstances make an award of expenses unjust.

(As amended Oct. 3, 1984, eff. Jan. 1, 1985; July 28, 1988, eff. Nov. 1, 1988; Nov. 29, 1995, eff. Mar. 31, 1996; _____, 2000, eff. _____, 2000.)

ADVISORY COMMITTEE NOTE

Rule 16 is directed to the scheduling and management of litigation. The Federal Rule refers to "pretrial" conferences, whereas the CIT rule refers to "postassignment" conferences. Since CIT litigation includes not only trials but also actions that are based on an administrative record, for which no trial will be held, a rule calling for a "pretrial conference" would seem to exclude some CIT actions. Therefore, the Committee recommends that the reference to "postassignment" be retained in Rule 16 and several other rules where it appears (e.g., Rules 33 and 36).

Under subdivision (a) of the current CIT rule, "the judge to whom the action is assigned" calls for the conference, whereas it is "the court," that calls for the conference for under Fed R. Civ. P 16(a). Pursuant to CIT Rule 77(f), the judge to whom the action is

assigned and the court are used interchangeably "unless the context of a particular rule clearly indicates otherwise." Within the context of CIT Rule 16(a), "court" and "judge to whom the action is assigned" appear to be equally appropriate and, in keeping with the Committee's operating premise that the CIT rules should be brought into conformity with the language of the federal rules unless there is a compelling reason to do otherwise, use of "the court" is proposed in CIT Rule 16(a).

Subdivision (b) of the CIT rule recognizes that Rule 56.2 has a scheduling mechanism specifically directed to actions brought under 28 U.S.C. § 1581(c). The language should be retained because it addresses circumstances unique to the CIT. The CIT rule also gives the judge to whom the action is assigned discretion to not issue a scheduling order when he or she "finds that a scheduling order will not aid in the disposition of the action and enters an order to that effect." The Fed. R. Civ. P., on the other hand, requires the judge or magistrate to enter a scheduling order "except in categories of actions exempted by district court rule as inappropriate." The Committee believes the CIT rule has worked well and is generally efficient, and does not recommend adoption of the Fed. R. Civ. P. language, which gives the judge less discretion and may be less efficient.

The issuance of the scheduling order is tied to the "appearance of a defendant" and/or service of the complaint on the defendant in the federal rules, whereas it is tied to assignment in the CIT rules. Because the Committee recommends that the "conference" controlled by Rule 16 continue to be tied to assignment of the action to the judge, the Committee also recommends that issuance of the scheduling order continue to be triggered by assignment (and not appearance of defendant or service of summons and complaint).

With respect to subdivision (c), the Committee recommends adopting Fed. R. Civ. P. 16(c)(4) regarding limitations or restrictions on the use of testimony.

The Committee recommends retaining the language "for submission of the action for final disposition" in current CIT Rule 16(c)(5), in lieu of adopting "for trial" in clause 7 of Fed. R. Civ. P. 16(c) because a CIT matter may be disposed of by action other than trial. Current CIT R. 16(c)(11) refers to "confidential or privileged information contained in the administrative record. . . ", while the Federal Rule contains no such provision. The Committee recommends retaining the CIT provision, which is pertinent to CIT practice and adding a reference to "business proprietary information". Fed. R. Civ. P. clauses (13), (14) and (15) do not appear in the CIT rule. The

subcommittee recommends their adoption since there is no reason unique to CIT practice for non-adoption. Fed. R. Civ. P. 16(c) allows the court to "require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute." The Committee recommends adoption of this provision as a potential aid to resolving pending disputes.